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91-320

Case No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THOMAS V. BARNES, et al.

Defendants/Appellants,

v.

JAMES C. MATLOCK,

Plaintiff/Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals approved and sanctioned a depature by the trial court from the accepted and usual course of judicial proceedings and further decided a federal question in a way that conflicts with applicable decisions of this Court, by finding that the trial court's dismissal of the individual capacity suits after trial made resolution of the qualified immunity issue moot.

2. Whether the Seventh Circuit Court of Appeals decided a federal question which should be settled by this Court, by finding that the position of Legal Investigator was not a policymaking or confidential position.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Appellants petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the District Court with respect to Thomas Barnes and the City of Gary is reported at 932 F.2d 658 (7th Cir. 1991), (App. A., infra).

The order of the United States Court of Appeals for the Seventh Circuit finding that the dismissal of the individual capacity suit made resolution of the qualified immunity issue moot is not reported (App. B., infra).

The order of the District Court partially granting Respondents Motion for Summary Judgment and denying Petitioners' Motion for Summary Judgment is not reported (App. C, Infra).

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on May 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This is an action arising under the First and Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sec. 1983.

The Respondent, James Matlock, was employed with the City of Gary in the Law Department as a legal investigator. The Defendant Thomas V. Barnes was the duly elected Mayor of the City of Gary, an Indiana Municipality. As such,

he was the chief executive officer of the City of Gary and was responsible for appointing the Deputy Mayor, Corporation Counsel, and the Director of the Personnel Department of the City of Gary. (Tr., pg. 135).

Defendant Richard Comer was the appointed Deputy Mayor of the City of Gary. As such, he had oversight responsibility for the setting and implementation of policy established by the Mayor and was answerable to the Mayor of the City of Gary. (Tr., pg. 135). The Defendant Gilbert King was the appointed Corporation Counsel of the City of Gary having overall responsibility of the Law Department and was answerable to the Mayor of the City of Gary. The Defendant Beulah Ware was the appointed Director of Personnel of the City of Gary and as such she was responsible for implementing personnel decisions of the City of Gary

and was answerable to the Mayor of the City of Gary. The Defendant City of Gary was and is an Indiana municipal corporation. (Tr., pg. 136).

In the May primary election for Mayor in 1987, Barnes won the election from the incumbent Richard Hatcher. On April 30, 1988, Comer observed Matlock escorting and acting as part of a personal entourage of former Mayor Richard Hatcher. (Brief Exh. G).

Subsequently, Mr. Matlock was transferred from his position of Law Department Investigator to the position of Corrections Officer at the Gary City Jail because he was in a confidential, sensitive position with reference to live lawsuits involving the City, a number of which involved Mr. Hatcher. The Defendants lost confidence in Mr. Matlock as a result of Mr. Matlock escorting former Mayor Richard Hatcher in May of 1988. (Brief Exh. F, G

and H). In addition, Defendant King had instituted a new office procedure in which files were not locked and all employees had access to the files and materials contained therein in these sensitive files in the Law Department. (Brief Exh. H).

Further, department heads, the Mayor and the Common Council routinely requested opinions from the Corporation Counsel and his staff relative to the operation of city government on politically sensitive matters. (Brief Exh. H).

Although each employee had a specific job title, they often worked in conjunction with each other on the same cases: Therefore, an inter-working relationship was necessary for the effective operation of the Law Department. There were matters that were of a confidential nature that was being handled by the Law Department. (Tr., pg. 452) (Brief Exh. H).

Plaintiff Matlock filed this action against Defendants Barnes, Comer, King, and Ware in their individual and official capacities, and against the City of Gary alleging that to transfer from his position of Legal Investigator to the position of Jail Turnkey was in retaliation for his political support of former Mayor Richard Hatcher. On October 23, 1989, the District Court entered an Order finding (a) the decision of the Defendant, Richard Comer, Gilbert King, Jr., and Beulah Ware to transfer the Plaintiff was politically motivated; and (b) the Defendant, City of Gary, is liable for any decision made by the Defendant, Thomas Barnes as Mayor. The Court further denied Defendants' Motion for Summary Judgment regarding the Defendants' qualified immunity defense. On October 30, 1989, the Defendant filed a notice of appeal regarding the Defendants qualified immunity defense. On

defense. On November 6, 1989. Trial commenced and after a five-day trial, the Jury returned a verdict for Matlock against all Defendants. The Defendants objected to the verdict for the reason that they were entitled to qualified immunity because at the time of Matlock's transfer, the issue of politically motivated transfer had not been determined to be in violation of the First and Fourteenth Amendment. The District Court, upon motion of Plaintiff, dismissed the claims against the individual named defendant and entered Judgment against the City of Gary and the Defendants in their official capacities on January 9, 1990, the Court of Appeal ruled the Defendants Appeal Nos. 89-3380 and 89-3432 be dismissed as moot.

On May 15, 1991, while deciding the appeal of the entire case on its merits, the Court of Appeals for the Seventh Circuit adopted the previous interlocutory ruling

that the dismissal of the individual capacity suits made resolution of the qualified immunity issue moot.

CONSTITUTIONAL PROVISIONS INVOLVED

In its pertinent parts, the Constitution of the United States of America provides:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

In its pertinent parts, 42 U.S.C. 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

REASONS FOR GRANTING THE WRIT

A. The Seventh Circuit Court of Appeals approved and sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings and further decided a federal question in a way that conflicts with applicable decisions of this Court, by finding that the trial courts dismissal of the individual capacity suits after trial made resolution of the qualified immunity issue moot on appeal.

While considering a motion for Summary Judgment, the U.S. District Court for the Northern District of Indiana, sitting in Hammond, Indiana failed to squarely rule on the qualified immunity issue as raised by the Appellants herein. The Appellants claimed immunity based on the notion that there was no clearly established law that prohibited Appellants from transferring Appellee for political reasons. The District Court insisted on first determing whether the Appellee held a confidential and/or policy making position and on whether his transfer was for political

reasons. The trial court's threshold consideration should have been Appellant's qualified immunity claim that a patronage transfer was not, then, protected by the First Amendment. See, Harlow v. Fitzgerald, 105 S.Ct. 2727 (1982).

In further deviation from appropriate judicial procedure, the District Court, after failing to squarely rule on the qualified immunity issue as a question of law, dismissed the Appellants in their individual capacities after a five day trial, so that it would not have to decide the qualified immunity issue.

The Seventh Circuit sanctioned this unusual procedure by purporting to adopt an interlocutory appellate panel's determination, after all district court procedures were over, that the issue was moot as an interlocutory appeal. Matlock v. Barnes, 932 F.2d 658 (7th Cir. 1991).

The trial court further compounded said deviation, by instructing the jury that the issue of a political transfer was a question of fact, but using the already-imposed summary judgment against Appellants in their individual capacities as a springboard for liability against the City.

Moreover, the District Court determined Appellant's motive upon the motion for summary judgment held that three (3) of the four (4) individual Appellants transfered the Appellee for political reasons. It indirectly directed a verdict against the City of Gary. It instructed the jury that the City was liable if either Deputy Mayor Comer or Mayor Barnes was politically motivated. It had already determined on summary judgment that Deputy Mayor Comer was politically motivated.

In footnote 3 of its opinion, the Seventh Circuit declares the trial court's dismissal of the individual defendants a "win" for the individual defendants. Clearly the trial court did dismiss the individual claims, but only after the five (5) jury trial and the return of a verdict against all defendants. This belated dismissal did not undo the harm done by the use of the summary judgment to establish and mandate a verdict against the City and the individuals. This procedure, if allowed, would constantly permit a circumstance capable of repitition, yet evading review. Thus, this question is not moot. It is a case of justice delayed being justice denied.

Qualified immunity is the recognition of an entitlement not to stand trial, or face the other burdens of litigation, conditioned onthe resolution of the

essential legal question of whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. See Mitchell v. Forsyth, 472 US 511, 526 105 S.Ct 2806, 2815, 86 L.Ed.2d 411 (1985).

Such departure and the sanction of said departure from the usual course of judicial proceedings warrants this Court's supervision. A grant of review and reversal of the Circuit Court's decision would be appropriate.

The District Court and Court of Appeals decided a federal question in a way that conflicts with applicable decisions of this Court.

The District Court's failure to rule on whether the transfer of the Appellee for

political reasons violated clearly established law and simply holding the City liable for transfering him for political reasons is in conflict with this Court's precedent on the issue of qualified immunity. Said decision also arbitrarily rendered the Mayor and the City liable without fair adjudication on the merits. Neither the District Court nor the Court of Appeals ever decided whether the Appellee, at the time of his transfer, had a constitutional right under the First Amendment not to be transfered for political reasons. This issue is outcome determinative to the City's and/or the Mayor's liability. Neither the Mayor nor the City could be properly held liable, since Appellee had not shown clearly established right to be free from a patronage transfer.

This Court held in Mitchell v. Forsyth, supra, that a defendant who raises the qualified immunity defense is immune unless said defendant violated clearly established law. Mitchell is directly on point. At the time of the Mitchell defendant's conduct, there was no clearly established law which protected the Mitchell plaintiff from warrantless electronic surveillance. By Executive Order it was legal. This Court held that the defendant Mitchell was immune since at the time of alleged conduct, the issue of illegality had not been determined. Id. at pg. 2820. The focus in determining whether there is a violation of clearly established law is on the law as it existed at the time of the engaged activity. See Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982).

In the case at bar, neither the District Court nor the Court of Appeals

decided the federal question of qualified immunity consistently with this Court's decisions in Harlow or Mitchell. In order to hold the City of Gary liable for violating a right, the Court must first determine whether the right existed at the time of the alleged wrongdoing. Id. 102 S.Ct. 2727, 2738. The District Court and the Court of Appeals failed to make this determination.

The alleged conduct on the part of the Appellants took place in 1988. In 1990, this Court in Rutan v. Republican Party of Illinois, __U.S. __ 110 S.Ct. 2729 (1990), held, for the first time, that political transfers were violative of the First Amendment. In so doing, it reversed the Seventh Circuit's 1989 opinion which said that only victims of patronage discharges, actual or constructive, enjoyed First Amendment protection. Thus at the

time of the Appellee's transfer in 1988, there was no clearly established law which provided him First Amendment protection.

According to law from this Court, Appellants were entitled to a ruling on it's qualified immunity claim and a denial of the Appellants' Motion for Summary Judgment based on qualified immunity was an order entitling Appellants to an immediate appeal. See Mitchell v. Forsyth, 105 S.Ct. 2806 (1985). Even under prior Seventh Circuit decisions, whether or not Appellants chose to take an interlocutory appeal, Appellants could again raise the issue on appeal from a trial on the merits. Kurowski v. Krajewski, 848 F.2d 767 (7th Cir. 1988).

In focusing on whether the Appellee held policy making or confidential position rather than determining if a patronage

transfer violated clearly established law, the District Court and the Court of Appeals decided a federal question inconsistent with the decisions of this Court. In declining to decide on an appeal on the merits whether a patronage transfer was, at the time made, protected by the First Amendment, the Court compounded the inconsistency. [1]

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[1] Neither the District nor the Circuit Court seemed to distinguish adequately the patronage discharge cases in which non-exempt employees were accorded First Amendment protection under Elrod-Branti, and the case at bar which involved an alleged patronage transfer. Witness footnote 4 of the Circuit Court's opinion, which, in part, states:

> "It is sufficient that he, as a decisionmaker possessing final authority to establish Gary's policy, authorized Matlock's firing."

[Emphasis added.] In the instant case, it is clear that Matlock was not fired. He was transfered.

Finally, this issue is outcome determinative as to all Appellants. If the Appellee did not have a constitutional right not to be transfered for political reasons in 1988, the jury could not have properly been directed to hold the City of Gary liable for violating the alleged right claimed by the Appellee.

Otherwise, the City would stand liable - as it does now - for violating a First Amendment right that did not exist at the time.

B. Whether the Seventh Circuit Court of Appeals has decided a federal question which should be settled by this Court by its finding that the position of Legal Investigator was not a policy making or confidential position.

In Rutan v. Republican Party of Illinois, __ U.S. __ (1990), 110 S.Ct. 2729 (1990), the majority held that promotion, transfer and recalls based on political affiliation or support are

impermissible infringments on public employees' First Amendment Rights. This decision was handed down on June 21, 1990. On May 15, 1991, the Seventh Circuit Court of Appeals, in the instant case, held that a legal investigator could not be transferred for political reasons, since the position of Legal Investigator was not a policymaking or confidential position. The instant opinion is at odds with the Seventh Circuit's own opinion in Hudson v. Burke, 913 F.2d 427 (7th Cir. 1990). There, the Seventh Circuit held that Legal Investigators are policymakers if they provide "sufficient subjective imput into policy decision so that political affiliation was an appropriate considerate for his firing." Matlock, the plaintiff herein, had duties which were the same as those in Hudson, supra. Nonetheless, the Court of Appeals stated that there was

insufficent evidence about the policymaking nature of the legal investigator job and that the jury seemed not to believe defendants professed concern about breach of office confidentiality. (See, App. A-11) This result is exactly what concerned Justice Scalia in Rutan v. Republican Party of Illinois, supra, at 2729 (1990), where he stated:

> "Elrod allowed patronage dismissals of persons in 'policymaking' or 'confidential' positions . . . Branti retreated from that formulation, asking instead "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." . . . What that means is anybody's guess."

The opinion went on to state that:

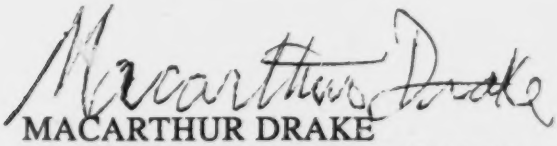
> "These interpretations of Branti are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision."

The opinion gave examples that illustrated the "shambles Branti has produced." As in the case at hand, the Seventh Circuit Court has not given the District Courts in its circuit any consistent guidance as to what is policymaking, confidential or when party affiliation is a permissible requirement. Here, we have a Legal Investigator in Chicago with the same duties and same input with a public official, as that of a Legal Investigator in Gary, 20 minutes away by car. Yet, one is exempt and the other is not. This Court should settle this confusion, not only in this circuit, but throughout the county by overruling Elrod, Branti, and Rutan, as Justice Scalia, Chief Justice Renquist, Justice Kennedy and Justice O'Connor professed in the dissenting opinion in Rutan, supra, at page 2756.

CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be granted and the Judgment and Order of the Court of Appeals should be reversed.

Respectfully submitted,



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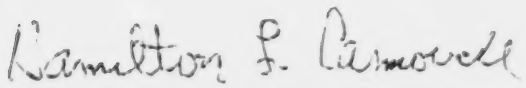

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